IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-104

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., *et al.*,
Petitioners,

v.

HUGH L. CAREY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONERS

NATHAN LEWIN
JAMIE S. GORELICK
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.—Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorneys for Petitioners

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INDEX

TABLE OF AUTHORITIES

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OPINIONS BELOW

The decision of the district court granting the defendants' motions to dismiss (Pet. App. 53a-58a)[1] is reported at 377 F. Supp. 1164. The order of the court of appeals dated July 16, 1974, denying interlocutory relief (App. 324)[2] is not reported. The order of the court of appeals dated August 23, 1974, affirming the denial of plaintiffs' motion for preliminary junction (App. 326) is not reported. The 2-to-

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[1] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari filed in this case.

[2] "App." refers to the Appendix filed with this Brief.

1 decision of the court of appeals affirming the district court's dismissal of the action (Pet. App. 7a-50a) is reported at 510 F.2d 512.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1975 (Pet. App. 5a-6a). A timely petition for rehearing and a suggestion for rehearing *en banc* were denied on February 27, 1975 (Pet. App. 3a-4a). On May 19, 1975, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including June 27, 1975 (Pet. App. 2a). On June 25, 1975, Mr. Justice Blackmun extended the time within which to file a petition to and including July 18, 1975 (Pet. App. 1a). The petition was filed on July 17, 1975, and this Court granted the petition for certiorari on November 11, 1975. 44 U.S.L.W. 3279. The jurisdiction of this Court rests upon 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Fourteenth and Fifteenth Amendments were violated by a deliberate racial gerrymander under which election lines were drawn on a racial basis to secure ten districts with white voting populations at 35 percent or less.

2. Whether such a gerrymander was rendered constitutional by the fact that it was carried out under the instructions of the United States Department of Justice, purporting to implement the Voting Rights Act of 1965.

3. Whether a racial gerrymander can be viewed as "corrective action" to remedy past discrimination if there has been no affirmative finding by any court or government agency that there was past voting discrimination which required correction and if there is no rational relationship between the form of the remedy and the nature of the discrimination it assertedly "corrects."

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1 of the Fifteenth Amendment to the United States Constitution:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

STATEMENT

1. Introduction

This case concerns the constitutionality of a plan of legislative apportionment approved by the New York legislature in special emergency session convened in late May 1974 in response to the disapproval, by the United States Department of Justice, of New York's 1972 reapportionment insofar as it affected New York and Kings Counties. The record establishes, beyond any doubt, that the challenged apportionment

was devised within severe time constraints attributable to the last-minute announcement of the Department of Justice, which left the New York authorities with insufficient time to secure judicial review of the Justice Department's disapproval of the 1972 districting. The time limitations also affected this litigation. Suit was filed promptly after the apportionment was announced and its effect on the plaintiffs became known. But even with this expeditious action, the litigation was thought by the district court (App. 22) and by the court of appeals as trenching too close to the actual time for balloting and, on this basis, all interlocutory relief designed to maintain the status quo was denied (Pet. App. 17a, n.9).

Time is again a factor insofar as the 1976 elections are concerned. For the reasons outlined in this brief, we believe that petitioners' voting power has been unconstitutionally diminished ever since May 1974. Another election will be held this year, and preliminary electoral activity will begin many months before Election Day.[3]

2. A Description of the Plaintiffs

The plaintiffs are eight individuals and an "umbrella" community organization which represents the Jewish residents of the Williamsburgh area of Brooklyn. All the individuals are voters registered at their home addresses in the area, and their complaint alleges that the effect of the challenged reapportionment is to dilute their vote, solely because of their race, in violation of the Fourteenth and Fifteenth Amendments (App. 11).

[3] January 13, 1976, was the opening date for circulating nominating petitions for district leaders (who are elected along State Assembly lines) and national delegates.

The plaintiffs are representative of the Jewish residents of the Williamsburgh area, who are overwhelmingly adherents of the Orthodox Jewish faith and form a closely knit community of Hasidim.[4] The Williamsburgh Hasidim began to settle in substantial numbers in the area during and after World War II, with the early settlers being refugees from the Nazi holocaust and survivors of the Nazi concentration camps. For almost 30 years, the community has developed and grown as a substantially self-sustaining and totally law-abiding group. Its present total population is approximately 30,000 (App. 77).[5] It is a closely knit community, led in all religious and spiritual matters by a rabbi and, in its other activities, by selected lay leaders. Because of distinctive religious rules and practices, which are scrupulously observed, the members of the group are immediately identifiable by their appearance and dress. They have encountered substantial discrimination and hostility from the outside world (App. 75-76), and this has caused their leaders to turn increasingly to their elected officials to secure protection of their right to live peacefully and secure-

[4] The nature of the community involved in this case is graphically described, in words and pictures, in a recent article that appeared in *The National Geographic* of August 1974. That article was appended to Petitioners' Reply Brief in Support of the Petition for a Writ of Certiorari. A leading study of the Hasidim, "The Hasidic Community of Williamsburg" by Solomon Poll, was introduced in evidence at the hearing of June 20, 1974, as Exhibit 9.

[5] Evidence regarding the Hasidic community was introduced at the hearing before Judge Bruchhausen on June 20, 1974, which is reproduced in full in the Appendix. The transcript of the afternoon session of the June 17, 1974 hearing appears there as well. By oversight, no transcript was made of the morning session of the June 17, 1974, hearing.

ly and free of unlawful discrimination (App. 6, 77-78). Over the past 30 years, other white residents of the Williamsburgh area left the region and moved elsewhere, but the Hasidic community has remained (App. 79). It now finds itself surrounded by neighborhoods which consist almost entirely of black and Puerto Rican residents.

It is undisputed that during the past 25 years, while the Hasidic community has resided in Williamburgh, the entire area in which the Hasidim live has been included in one State Senate District and one State Assembly district.[6] This recognition of the unitary nature of the community encouraged those in the Hasidic community who are seeking to improve participation in the democratic process to begin registration drives and promote voting on election day.

3. Hasidic Participation in the Electoral Process

Because Hasidim still carry over the customs and traditions of their European ancestors, they consider the democratic process strange (App. 38-39). In addition, as the remnants of the destruction and terror of concentration camps, they view the outside world with great skepticism and mistrust (App. 39). Much of the community believes that it must "continue with the self-imposed exile of remaining in a ghetto, of not joining the mainstream" (App. 78), and its individual members have, therefore, been most reluctant to participate in any way in the process of registration

[6] We mention this fact *not* because we contend that there is any right—constitutional or statutory—for permanent recognition of a community in legislative apportionment. Our argument is, rather, that the history of the area demonstrates that there could be—and in fact was—*no reason other than race* to divide the community at this time.

and voting.[7] Certain leaders have, however, persuaded segments of the community that it is in the group's best interest to register and to vote, but this effort to achieve participation has not been easy; it has "taken all we could do" (App. 39).

In the interests of the community, the group's leaders have dealt with elected officials and publicly supported candidates who would best serve the community's interest. The history of this support has shown that the Hasidic community is not racially or religiously discriminatory in its political preferences. In 1972, the community actively supported a Catholic candidate for the United States Congress over two Jewish opponents (App. 42-43). It supported a Puerto Rican woman for the job of Democratic District Leader over white opposition, as well as other non-Jewish candidates against Jewish opposition (App. 75).

4. The 1972 Legislative Apportionment

Legislative apportionment in New York has been the subject of substantial litigation. In *WMCA, Inc.* v. *Lomenzo,* 377 U.S. 633 (1964), the Supreme Court held that New York's apportionment scheme was constitutionally invalid. Despite further litigation in the federal and state courts,[8] a proper formula that would

[7] The descriptions summarized here are taken from the testimony given by Rabbi Albert Friedman and Rabbi Chaim Stauber at the hearing on June 20. Both are community leaders, the former being vice-chairman of the Williamsburgh Community Corporation and the individual who has led political efforts by the community, and the latter being the editor of the principal Yiddish newspaper serving the community.

[8] *E.g., WMCA, Inc.* v. *Lomenzo,* 238 F. Supp. 916 (S.D.N.Y.), *aff'd* 382 U.S. 4 (1965); *WMCA, Inc.* v. *Lomenzo,* 246 F. Supp. 953 (S.D.N.Y.), *aff'd sub nom., Travia* v. *Lomenzo,* 382 U.S. 4 and 382 U.S. 9 (1965).

be consistent with federal constitutional standards and with the New York State Constitution's requirements was not determined. Finally, in *In the Matter of Orans,* 15 N.Y. 2d 339, 206 N.E. 2d 854, *appeal dismissed,* 382 U.S. 10 (1965), the New York Court of Appeals definitively construed the New York State Constitution and established a Judicial Commission which drew up an apportionment plan to meet both sets of standards. The Commission's report was adopted by the New York Court of Appeals in 1966 *(In the Matter of Orans,* 17 N.Y. 2d 107, 216 N.E. 2d 311 (1966)), but the 1965 election had been conducted under federal court order which implemented the only one of four plans that satisfied federal constitutional standards. *WMCA, Inc.* v. *Lomenzo,* 238 F. Supp. 916 (S.D.N.Y.), *aff'd,* 382 U.S. 4 (1965).

The New York Legislature had, on March 15, 1965, established a Joint Legislative Committee on Reapportionment to apportion the Senate and Assembly in conformance with the provisions of Article III of the New York Constitution insofar as those do not conflict with the one man-one vote requirement of the equal protection clause of the Fourteenth Amendment. On December 14, 1971, the Committee, whose Executive Director was Richard S. Scolaro (a witness at the June 20 hearing), issued a report in which it proposed substantially the apportionment of the New York State Legislature that was adopted in January 1972. Law of January 14, 1972, ch. 11, §§ 120-128 (1972), McKinney's Sessions Laws of New York.

In December 1971, the State of New York instituted an action in the District Court for the District of Columbia under Section 4(a) of the Voting Rights Act, as amended, 42 U.S.C. § 1973 b(a), seeking a declara-

tory judgment that New York was exempt from the provisions of the Act.[9] On April 3, 1972, the United States consented to the entry of summary judgment in that case. Four days later, the NAACP requested leave to intervene. The motion to intervene was denied, and the three-judge district court granted New York State's motion for summary judgment. *New York* v. *United States,* Civ. No. 2419-71 (D.D.C.) (unreported).

The NAACP then appealed to this Court from the denial of its intervention motion. Although it affirmed the decision below, this Court indicated that, in view of the district court's mandatory retention of jurisdiction under the Voting Rights Act, the NAACP would be able to intervene and assert any claims it might make at a later date. *NAACP* v. *New York,* 413 U.S. 345 (1973). Thereafter, such intervention was allowed, and the argument was made to the three-judge district court that the failure to provide ballots in Spanish constituted the use of a discriminatory "test or device." See *Torres* v. *Sachs,* 381 F.Supp 309 (S.D.N.Y. 1974). On January 4, 1974, without issuing any opinion, the three-judge District Court for the District of Columbia rescinded its earlier declaratory judgment and entered an order determining that New York, The Bronx and Kings counties were covered by the Act.

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[9] The "automatic trigger" of the 1970 Amendments to the Act, 42 U.S.C. § 1973 b(b), had brought New York, The Bronx, and Kings counties within the Act's coverage because "tests or devices" had been used in those counties and less than 50 percent of voting age residents had voted in the 1968 Presidential elections. 36 Fed. Reg. 5809 (1971). Accordingly, it was the State's burden to prove that no tests or devices had been used with the purpose or effect of denying the right to vote on account of race.

This Court affirmed. *New York* v. *United States,* 419 U.S. 888 (1974).

Pursuant to the District Court's conclusion, the 1972 apportionment was submitted on February 1, 1974, to the Attorney General of the United States under Section 5 of the Voting Rights Act. 42 U.S.C. § 1973(c). On April 1, 1974, in a letter to the Office of the Attorney General of New York from Assistant Attorney General J. Stanley Pottinger, the Department of Justice disapproved the 1972 apportionment insofar as it affected certain election districts in New York and Kings counties. Although the NAACP tried to persuade the Department of Justice that there had been racial gerrymandering in those counties in the past and that lines were deliberately drawn for the purpose of discriminating against minorities (App. 201-231), the Assistant Attorney General made no such findings. The only basis for disapproval was that the State had failed to meet its burden of proving that the apportionment would not have the effect of abridging the right to vote on account of race. As to State Senate and Assembly districts in Kings county—which is what this case involves—the Department of Justice found the following (App. 15):

> Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. As with the congressional plan we know of no necessity for such configuration and believe other rational alternatives exist.

5. The Response of New York State Authorities

Although Section 5 of the Voting Rights Act authorizes the State to obtain a judicial determination regarding any change in voting practice or procedure which it seeks to implement, even if the Attorney General disapproves of such change, the New York State authorities did not institute any proceeding to this end.[10] Their view was stated in the subsequently issued report of the Joint Legislative Committee on Reapportionment (App. 174):

> While the Joint Legislative Committee on Reapportionment does not subscribe to the ruling of the Justice Department as expressed in the April 1 letter of Assistant Attorney General J. Stanley Pottinger, the exigencies of time require that new legislation be enacted to satisfy immediately the objections of the Department of Justice and thereby permit an orderly primary and general election to take place in New York and Kings Counties in 1974.

The opinion that the Department of Justice was wrong was held by Mr. Scolaro, as well as by the members of the Joint Legislative Committee (App. 177). However, because the legislature felt "forced to the wall by reason of time" (App. 102), the committee drew up the plans which are substantially those under challenge in this case.

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[10] Judge Bruchhausen's opinion says that "several groups sought to appeal the ruling of Mr. Pottinger, but met with failure when their actions were dismissed by the District Court for the District of Columbia" (Pet.App. 55a). This assertion refers to an action filed on behalf of four state legislators, whose complaint was dismissed on the ground that they had no standing. *Griffith* v. *United States*, 74 Civ. No. 648 (D.D.C.).

In order to meet this deadline, Mr. Scolaro had "one very lengthy meeting in person" and many telephone conversations with Department of Justice attorneys to learn what criteria would satisfy the Department (App. 103-104). He was never given a specific percentage figure, but he and other staff members were told that it would be necessary to devise two more Senate districts and two more Assembly districts with "*substantial* non-white majorities" (App. 179-182; emphasis added). The Assembly district in which the entire Williamsburgh Hasidic community was located under the 1972 apportionment had a nonwhite population of 61.5 percent, but the Department of Justice indicated that this was not sufficiently "substantial" (App. 98-99, 105). Scolaro then inquired how much higher the nonwhite percentage would have to be (App. 105-106):

> I said how much higher do you have to go? Is 70 percent all right?
>
> They didn't say yes or no, but they indicated it is more in line with the way we think in order to effect the possibility of a minority candidate being elected within that district.
>
> I suggested 65 percent. It came out at that time that is a figure used by the NAACP in numerous briefs and other documents.
>
> I got the feeling, and I cannot vouch for this as a matter of having been specifically said, but I left that meeting indicating that 65 percent would be probably an approved figure.

Scolaro also testified that, as a result of his meetings and discussions, "I thought it was logical for me to assume anything under 65 percent would not be acceptable" (App. 106).

In his discussions with the Department of Justice, Scolaro pointed out that if the white residents of the area had to be fragmented to meet the higher percentage demanded, the Hasidic community would no longer be "contained as an integral unit" (App. 116). He concluded that the Department of Justice had no understanding of that problem and attorneys in it did not even know where the community resided and where Williamsburgh was located (App. 117). In trying to preserve the Hasidic community as a unit in the 57th Assembly District, the Committee could come up with no greater percentage of nonwhites in that district than 63.4 percent. Scolaro testified (App. 115):

> [I]t was our determination at that time, after all of our consultation with the Justice Department, that increasing a percentage from 61.5 to 63.4, would not be acceptable to effect compliance . . . .

Accordingly, the reapportionment plan under which the Hasidic community was divided—almost in half—for Senate and Assembly district purposes was recommended and approved by the legislature as Chapters 588, 589, 590, 591 and 599 of the Laws of New York of 1974, whose constitutionality are being challenged in this action. Scolaro's testimony was (App. 112; emphasis added):

> Q. So that your reason for dividing the Hasidic community was to effect compliance with the Department of Justice determination, and the minimum standard they impose—they appear to impose?
>
> A. *That was the sole reason.* We spent over a full day right around the clock, attempting to come up with some other type of districting plan that would maintain the Hasidic commun-

> ity as one entity, and I think that evidenced clearly by the fact that that district is exactly 65 percent, and it's because we went block by block, and didn't go higher or lower than that, in order to maintain as much of the community as possible.

6. The Effect of the 1974 Apportionment

There was no advance warning to the Hasidic community that it would be cut in half by this apportionment on account of the race of its members. Witnesses have testified that the effect of the announcement was "devastating. . . . a direct slap in the face" (App. 40). Rabbi Stauber, editor of the community newspaper, testified that many people had suggested to him that this was retribution upon the community "for really having the guts and having the clout to be a considerable force and factor in the political life of the City" (App. 78), and that others—reflecting the view of the skeptics—had said that "we are simply being penalized for taking a stance in politics, for not knowing our place, so to speak, remaining in Synagogues, instead of coming out and really turning out the vote" (App. 78). As a result, "the voting drive has stalled" (App. 42). The community is now saying "why come out again and vote for these very people or any other" (App. 80). The morale of the community "has sagged to an all time low" (App. 80).

7. Litigation

On June 11, 1974, this action was instituted. A hearing was held before Judge Bruchhausen on June 17, 1974, the first day for circulating nominating petitions under the State's "political calendar." Counsel for all parties were present, as well as counsel for the

NAACP, which had been served with the papers because of its obvious interest in the case. Plaintiffs requested a temporary restraining order that would maintain the status quo and not authorize the gathering of signatures in questionable districts during the pendency of the litigation. Judge Bruchhausen first said he would enter a temporary restraining order and directed counsel to agree on its terms. After a recess, counsel for the Kings County Republican Committee entered an appearance and argued that since petition-gathering had begun that morning the work of many party members would be wasted if an order were entered. On determining that counsel for the Kings County Republican Committee was opposed to the temporary restraining order, Judge Bruchhausen said, "Once, once in a while, I reverse myself. I think I have heard enough pro and con. I will not enter the TRO" (App. 22).

A hearing was held on June 20, 1974, on plaintiffs' motion for a preliminary injunction. Evidence was taken, and full cross-examination was permitted. Under an accelerated briefing schedule, the full initial briefs were filed with the district court by June 29, 1974. In addition to the request for a preliminary injunction, plaintiffs moved, on the basis of the evidence at the hearing, for summary judgment. The Attorney General of the United States also moved to be dismissed as party defendant, although a representative of the United States Attorney's office was present throughout both hearings and was afforded full opportunity to argue, offer evidence, and cross-examine (App. 19).

On July 1, 1974, Assistant Attorney General Pottinger issued a letter approving the 1974 apportionment

with an explanatory memorandum which stated why the plan was being approved even though it did not benefit Puerto Rican voters. With regard to the claims of the plaintiffs, the Memorandum stated that there was no indication in the history of the Fifteenth Amendment or the Voting Rights Act "that Hasidic Jews or persons of Irish, Polish or Italian descent are within the scope of the special protections defined by the Congress in the Voting Rights Act" (App. 293).

When Judge Bruchhausen failed to rule on the pending motions by July 12, 1974, the plaintiffs sought relief from the court of appeals on the ground that the closing date for nominating petitions was July 17 and they would be seriously harmed if there were no judicial action by that time. The court of appeals dismissed that appeal on July 16, 1974, and denied a request for interlocutory relief, on the grounds that there was still no appealable order that had been issued by Judge Bruchhausen. The denial was, however, "without prejudice to renewal" (App. 324).

On July 25, 1974, Judge Bruchhausen filed his opinion and order. He ruled that the plaintiffs' claim was "untenable" because the approval by Assistant Attorney General Pottinger on July 1, 1974, made the apportionment lawful under the Voting Rights Act and because the plaintiffs are not constitutionally entitled to "separate community recognition" in the apportionment process (Pet.App. 57a). He also held that "racial considerations have been approved to correct a wrong" (Pet.App. 58a).

8. The Court of Appeals' Decision

Briefing and argument of the appeal was expedited so as to secure review in time to affect the 1974 elec-

tion. On August 23, 1974, the court of appeals issued an order affirming the denial of a preliminary injunction (App. 326), and the court's full opinion affirming the district court's judgment was issued on January 6, 1975. Speaking for the majority, Judge Oakes held that there was district court jurisdiction over the action and the petitioners had standing to maintain it as white voters (Pet.App. 20a-27a). He ruled that the Attorney General should have been dismissed as a party defendant (Pet.App. 21a),[11] and otherwise affirmed the dismissal of the complaint. Viewing the case as if it were a challenge by the white community to a fully considered legislative districting plan which diluted white voting power, the majority said that the evidence was insufficient to prove political or other racial discrimination against whites in Kings County and that whites were proportionately represented in the State legislature (Pet.App. 27a-28a). It sustained the purposeful use of racial criteria on the ground that it was necessary "[t]o correct an invidious discrimination in favor of white voters and against nonwhites" (Pet.App. 31a). The majority's holding was summarized as follows (Pet.App. 31a-32a):

> [S]o long as a districting, even though based on racial considerations, is in conformity with the unchallenged directive of and has the approval of the Attorney General of the United States under the Act, at least absent a clear showing that the resultant legislative reapportionment is unfairly prejudicial to white or nonwhite, that districting is not subject to challenge.

Judge Frankel dissented on the ground that it is unconstitutional to draw district lines "with a central

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[11] Judge Bruchhausen never formally ruled on the Attorney General's motion to dismiss.

and governing premise that a set number of districts must have a predetermined nonwhite majority of 65% or more in order to ensure nonwhite control in those districts" (Pet.App. 32a-33a). He concluded that it was "at war with our bedrock concepts of individual worth and integrity" deliberately to organize "a polity . . . into districts whose people are proportional according to whether they are white, black, yellow . . ." (Pet. App. 39a). Judge Frankel rejected the assertion that the racial standard was permissible "corrective action" on two grounds: *First*, that neither the legislature nor any other responsible official had found the 65 percent quota to be an appropriate corrective measure for anything, and *second*, that no reasonable basis could be found in the record for such a standard (Pet. App. 40a). Judge Frankel noted, in conclusion, the "unbearable and absurd implications" of the proportional representation remedy urged by the New York Legislature which would require similar treatment for a "dizzying mass" of racial and ethnic groups (Pet. App. 49a).

INTRODUCTION AND SUMMARY OF ARGUMENT

This is not the first case involving an allegation of racial gerrymandering to come before this Court, but it is the first such case in which there is absolutely no factual dispute as to the legislature's dominant purpose or motive. The majority of the court of appeals began its opinion by noting that the central issue was whether an apportionment "specifically drawn to ensure nonwhite voters a 'viable majority'" (Pet. App. 9a) is permissible under the Fourteenth and Fifteenth Amendments. The undisputed proof demonstrates that there is only one reason why the petitioners here—members of the Hasidic community of Williamsburgh

—now find themselves divided and voting in separate state senate and assembly districts: Its members are white and they could not be maintained as a unit in the legislative districts where they previously were located without having the white population of those districts exceed 35 percent.

If the petitioners' skin were black, brown, red or yellow, the apportionment challenged here would never have reached this Court. Any federal judge mindful of his oath to enforce the Constitution would instantly strike down a districting scheme which was flagrantly designed to keep blacks, Chicanos, Indians or orientals at not more than 35 percent of an election district. The only ground on which this legislation was defended below and is defended here is that it is "compensatory districting," designed to benefit certain nonwhite residents of Brooklyn by including them in electoral units where nonwhites will have a "viable majority."[12] We challenge the underlying proposition that race-consciousness is desirable or constitutionally permissible in legislative districting when done for "benign" motives. We believe that the Fourteenth and Fifteenth Amendments no more permit this form of color-conscious manipulation of the electoral process when those doing the manipulating are seeking to help blacks than when they are trying to minimize or reduce

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[12] We have, as we indicate below, pp. 56-57, *infra*, substantial questions as to the legitimacy—both in terms of the Constitution and in terms of public policy—of the categorization of the groups involved in this case as "white" and "nonwhite" because it absorbs into the second group diverse racial communities whose interests are not helped by such classification. We also wonder what support there is in reason and policy for the notion of a "viable majority" —apparently defined here by *fiat* as 65 percent or more. See pp. 55-56, *infra*.

black voting power. Racially motivated legislative districting invariably promotes racial separation and racial partisanship and sows quickening seeds of racial strife and hatred.

Before turning to an elaboration of this position, we emphasize a point that should not have to be said, but that is best expressed so as to avoid misunderstanding. These petitioners are, personally and as a community, strongly supportive of energetic federal enforcement of the civil rights of racial minorities, particularly the right to vote protected by Article I of the Constitution, the Fourteenth and Fifteenth Amendments, and the federal civil rights laws including the Voting Rights Act of 1965. The vigorous and successful governmental efforts made during the past two decades to assure voting rights for black Americans is a glorious chapter in our nation's history. Invidious attempts to deny, minimize or dilute the votes of blacks or other minorities are offensive to the petitioners, who are, themselves, the small surviving remnant of the most brutal discrimination known to our modern age. But the attempt made here by a misguided—even if benignly motivated—Department of Justice (and, because of federal threats, by the New York Legislature) is not, we believe, part of this great struggle for racial equality. It is an effort, rather, to achieve short-range benefits at great long-range costs, and it demeans the lofty principles of equality which have marked earlier civil rights efforts, including the enactment in 1965 of the Voting Rights Act.

Our challenge to the New York legislation proceeds on three alternative grounds. Our first argument is the most simple and clear-cut, and it also rests on the broadest holding which we urge on the Court. We

argue first that there is *never* any justification for race-consciousness in the electoral process. This Court has approved of color-conscious remedies in certain limited areas—particularly in the integration of previously segregated public schools and in the opening of employment opportunities previously closed to minorities. In these circumstances, race may be considered by government agencies, in keeping with the oft-quoted admonition of the Fifth Circuit that "the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 876 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967). But we conceive of no factual circumstances in the voting area, similar to that in public education or employment, where race-consciousness is necessary "to undo the effects of past discrimination" or prevent its perpetuation. If an apportionment is or has been racially discriminatory, it may and should be set aside, and a new apportionment—based on "neutral" criteria—should replace it. No seniority builds up in voting—as it does in employment—and no established attendance or assignment patterns develop over years of racial discrimination—as they do with regard to public school students and teachers. Hence the cure for a racial gerrymander, if one is shown to have occurred, is fair nonracial apportionment—not districting designed to maximize the voting power of blacks, Puerto Ricans or any other minority.

Conversely, we argue that the societal costs of race-conscious remedies in the electoral area are very high. Mr. Justice Douglas—who entertained no crabbed view of the importance of totally rooting out racial discrimination—vigorously protested race-conscious

apportionment in his dissent in *Wright* v. *Rockefeller*, 376 U.S. 52, 61 (1964), bringing within his condemnation both benign and invidious racial gerrymandering. We believe that if legislatures are permitted overtly to draw electoral lines to achieve racial representation, racial partisanship will be encouraged and the premises of the Fourteenth and Fifteenth Amendments will be undermined.

Our second argument assumes, *arguendo*, that there may be some situations where deliberate racial decisions may be made, even in electoral apportionment, to correct "past discrimination" or prevent its "perpetuation." We argue, however, that on the facts of record here, this is plainly not such a case. There has been *no* finding by any judicial or administrative body whatever that there *was* racial discrimination in the drawing of the district lines for the New York State Senate or Assembly in Brooklyn. In fact, the record establishes that, in one of the districts at issue here, "nonwhites" numbered 61.4 percent of the total population under the 1972 reapportionment—hardly a powerless minority. The invalidation of New York's 1972 reapportionment by the Department of Justice rested on a very slim reed—the double-negative finding, based on a Justice Department regulation,[13] that the State's proof had *not* established that the new apportionment had *no* effect on minority-race voting. The 1974 reapportionment was, therefore, not "corrective" of dem-

[13] See 28 C.F.R. § 51.19, which casts the burden of proof on the issue of "racially discriminatory purpose or effect" on the governmental body submitting a change to the Department of Justice. This regulatory provision was sustained, over the dissents of Justices White, Powell, and Rehnquist, in *Georgia* v. *United States*, 411 U.S. 526 (1973).

onstrated past discrimination; at most, it was engendered by "evidence . . . in equipoise" (411 U.S. at 545; White, J., dissenting) on an issue where, by regulation, such a balance results in a finding of invalidity.

Accordingly, even if a record establishing past racial discrimination would permit compensatory racial reapportionment, this is not a case involving such a record. Because there was no showing of actual discrimination, the New York Legislature had no constitutional right to discriminate against these petitioners by drawing new district lines in 1974 that limited their race to not more than 35 percent. Nor did the Department of Justice have constitutional authority to demand, or even to suggest, race-conscious discriminatory redistricting where it was unable to find, from the record before it, that there had been racial gerrymandering.

Our third alternative argument is the most narrow, and it relates to the particular quota remedy used by the Department of Justice and the New York Legislature. For purposes of this argument, we accept, *arguendo*, the propositions that (1) there may be instances where race-consciousness is justified in electoral apportionment and (2) there was past racial discrimination in the districting of Brooklyn that warranted some compensatory racial remedy. The record—as well as human experience—is devoid, we believe, of any justification for the remarkable "quota" remedy undertaken by the New York Legislature (acting under the lash of the Department of Justice). If "nonwhites" were, in fact, the victims of racial gerrymanders in Brooklyn in past years, how does a 65 percent quota requirement in several districts neighboring on Bedford-Stuyvesant correct or compensate for that in-

justice? Judge Frankel, in dissent, convincingly demonstrated that there was no rational relation between the remedy chosen and the evil being remedied. Yet it was that remedy—the specific requirement that no more than 35 per cent of the district be white—that resulted in the harm to the petitioners.

ARGUMENT

I

DELIBERATE RACIAL GERRYMANDERING, EVEN IF DESIGNED TO INCREASE THE VOTING POWER OF RACIAL MINORITIES, IS A PER SE VIOLATION OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS

This Court first confronted a racial gerrymander in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), which established—even in the days when the "political thicket" principle of *Colegrove* v. *Green*, 328 U.S. 549, 556 (1946), held sway—that the Fifteenth Amendment would be violated by the deliberate drawing of electoral lines to affect voters on account of their race. The principle of the *Gomillion* case was reaffirmed by the Court in *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), although the Court's judgment sustained a decision, on a particular record, that congressional districts which had allegedly been drawn along racial lines were not "the product of a state contrivance to discriminate against colored or Puerto Rican voters." 376 U.S. at 57. As a result of *Gomillion*, *Wright*, and some lower-court decisions such as *Sims* v. *Baggett*, 247 F.Supp. 96 (M.D. Ala. 1965) (on remand from this Court's decision in *Reynolds* v. *Sims*, 377 U.S. 533 (1964)), the governing constitutional rule regarding alleged racial gerrymandering was articulated as follows by the Court of Appeals for the Fifth Circuit, where most of

such litigation arose (*Howard* v. *Adams County Board of Supervisors*, 453 F.2d 455, 457 (5th Cir. 1972), *cert. denied*, 407 U.S. 925 (1972) (citations omitted)):

> [T]o establish the existence of a constitutionally impermissible redistricting plan, in the absence of malapportionment, plaintiffs must maintain the burden of proving (1) a racially motivated gerrymander, or a plan drawn along racial lines, *or* (2) that "... designedly or otherwise, a[n] ... apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."

The undisputed facts of this case satisfy the first of these disjunctive conditions, and therefore make it unnecessary to consider the effect of the districting—*i.e.*, whether it "unconstitutionally operate[s] to dilute or cancel the voting strength of racial or political elements." *Whitcomb* v. *Chavis*, 403 U.S. 124, 144 (1971). The 1974 New York apportionment, insofar as it affected Assembly Districts 56 and 57 and Senate Districts 23 and 25, was "racially motivated" and was "a plan drawn along racial lines." If there were no more to this case, this proposition would suffice to render the 1974 redistricting "constitutionally impermissible," just as Alabama's 1965 reapportionment of its House of Representatives was invalidated in *Sims* v. *Baggett*, 247 F.Supp. 96, 107-110 (M.D. Ala. 1965), because racial discrimination "was what the Legislature intended." 247 F.Supp. at 109.[14]

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[14] This Court's most recent discussion of the subject of alleged racial malapportionment fixes, we believe, the guiding principles in this area. In *City of Richmond* v. *United States*, 422 U.S. 358 (1975), this Court sustained governmental action which had the effect of reducing the relative political strength of a minority

There is, however, one important difference between this case and *Sims* v. *Baggett*. The racial gerrymander here was not designed to deny voting power to a black or other racial minority that had been deprived of the right to vote in the past. Rather, it had what has come to be known as a "benign" purpose—to maximize the opportunities of black and other nonwhite citizens to elect legislators who are members of minority races. Thus the initial issue before this Court is the "important federal question" mentioned in *Taylor* v. *McKeithen*, 407 U.S. 191, 193-194 (1972)—*i.e.*, whether "the colorblind concept" of *Gomillion* and *Wright* forbids even "benign districting" which is used "to overcome the residual effects of past state dilution of Negro voting strength."

For reasons elaborated in later sections of this brief, we believe that even were "benign" racial districting permissible for such a remedial purpose, this record shows no need for a remedy and no rational relation between any alleged "residual effects" and the remedy selected by the United States Department of Justice

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race if such action—albeit originally taken for a racially discriminatory purpose—could now be supported by "verifiable reasons." 422 U.S. at 374. Notwithstanding this conclusion, the Court remanded the case for further proceedings to determine whether there were current "justifiable reasons" to overcome the original impermissible purpose.

The Court concluded its *Richmond* opinion with an explanation of why the case was being remanded for "proceedings with respect to purpose alone." It noted that action taken for a racial purpose "has no legitimacy at all under our Constitution or under the statute." It described deliberate conduct of this kind as "gross racial slurs" which "have no credentials whatsoever" no matter what its effect. 422 U.S. at 378-379.

and the New York Legislature. But our initial position is that districting along racial lines is at odds with the fundamental values of our nation and with the historic principles of the Fourteenth and Fifteenth Amendments. Consequently, no matter how "benign" its purpose and irrespective whether it is implemented by a legislature, a judge or a federal executive official, districting along racial lines should be declared unlawful by this Court.

A. Racial Districting Is Divisive

The evil of racial gerrymandering when it is directed against minorities which have previously been denied the franchise or otherwise subjected to racial discrimination requires no elaboration. "It would be unfortunate," as the court noted in *Sims* v. *Baggett*, 247 F.Supp. 96, 109 (M.D. Ala. 1965), "if Alabama's Negroes were to find, just as they were about to achieve the right to vote, that that right had been abridged by racial gerrymandering." Less obvious, however, is the vice of racial gerrymandering that *favors* minorities—that is claimed to be "compensatory," "corrective," "remedial" or "benign." In this area, there is some tendency to believe that minority races may, or even should, be favored, on the same grounds as it is argued that there must be corrective "affirmative action" in the fields of public education, employment or housing. See, *e.g.*, *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971); *Associated General Contractors* v. *Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *Contractors Association* v. *Secretary of Labor*, 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971). Such a position ignores the unique quality of the elec-

toral process and proceeds on various dubious premises which are refuted by history and common experience.

Representative democracy, as practiced in the United States, does not depend on legislators being directly responsible to particular ethnic, religious, racial or social classes or groups. Dissenting in *Wright* v. *Rockefeller,* 376 U.S. 52, 59-67 (1964), Mr. Justice Douglas noted the distinction between our system of representative government and the Electoral Register System introduced to India by the British and used, as a form of proportional repesentation, in other countries. Our legislators represent, and are elected by, voters residing in geographic areas which form electoral districts. It is inconsistent with the postulates on which this system of representative government is based to permit the configurations of these geographic areas to be drawn so as to produce, *ab initio,* legislators who have particular racial or ethnic affiliations. As Justice Douglas observed (376 U.S. at 66):

> Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on.

Moreover, such a policy in voting heightens the racial partisanship which the Fourteenth and Fifteenth Amendments were designed to overcome. Justice Douglas' dissent in *Wright* v. *Rockefeller* contained observations that are fully applicable to all racial gerrymanders, whether benign or malignant (376 U.S. at 67):

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan.

The notion that there is benefit to our society by deliberate compensatory racial districting proceeds from the premise that justice to disadvantaged racial minorities in the United States can be achieved if more members of such minorities are elected to public office. It is assumed that this can best be accomplished by now maximizing the voting power of racial minorities so that their bloc votes will elect their representatives. These suppositions are erroneous in various respects.

B. Racial Prejudice Can Be Overcome

The first erroneous assumption is that racial and ethnic prejudices are, and will forever be, the principal determinant of choice in the voting booth. On this ground, it is assumed that even in a jurisdiction like New York, where there is no history of exclusion of blacks from the political process, nonwhite legislators can be elected only in districts where nonwhite voters comprise a "viable majority." Rather than supporting this premise, the history of this country convincingly demonstrates the contrary. It was once believed that Italians, Irishmen or Jews could not possibly be elected to public office except where their ethnic groups provided solid voting blocs. Similarly, it was believed that religious or ethnic groups voted as a single unit.[15]

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[15] In October, 1832, "Eighty-Five Israelites" had to write to *The Charleston (S.C.) Courier* to rebut the assertion that Jews were voting as a unit. The open letter read, in its entirety:

The meeting of Israelites, held on Saturday night [September

A most commonly held belief at one time was that no Catholic could ever be elected President. A charge of

29], was dissolved by an attempt to convert it into a meeting for party purposes. The subscribers unite to carry into effect the true object of said meeting.

WHEREAS, it is understood by the subscribers, belonging *to both parties*, that an impression has been produced upon the minds of a portion of our fellow-citizens, that the Israelites of Charleston are desirous of being represented as a *religious sect* in our State Legislature; and moreover, that a list or petition was put into the hands of the Chairman of the Executive Committee of the Free Trade and State Rights Party, for a representation in the State Legislature. A measure only to be known to be at once disclaimed and disavowed, as calculated to impair the confidence of the community in their independence, their personal pride and their sense of propriety. And, whereas, our political relations are identified in a common bond with our fellow-citizens, a sanction to such a course would indicate a desire on their part to impair the freedom of choice from among their fellow-citizens generally.—Therefore, we the subscribers agree to the following:

Resolved, We unite specially for the purpose of disclaiming, that the Israelites of Charleston have expressed a desire or intention to nominate any individual whatever.

Resolved, That we wholly disclaim any wish or intention to be represented as a peculiar community, and that we discountenance the idea of selecting any individual for office, either of profit or honor, upon the ground that such individual belongs to a particular sect, with the view of securing or of influencing the suffrages of such sect.

Resolved, That the perfect independence of the Israelites of Charleston, is beyond the control of any individual, it matters not to what sect or party he may be attached.

Resolved, That if any lists, from any motives whatever, have been drawn up, and handed about to secure the signatures of individuals, so as directly or indirectly to insist on, or to influence the nomination of any person from either party, such lists are neither sanctioned nor tolerated by us, and must have proceeded from persons not authorized by the will or wish of the undersigned.

Resolved, That while we are sensible there are gentlemen among

"Rum, Romanism and Rebellion" may have affected the election of 1884, but—without "benign" governmental manipulation of electoral districts—the bogey of national religious prejudice was dispelled in 1960.

There is ample proof today of the falsity of the premise that black candidates have a chance of being elected only where there is a comfortable majority of black voters. Massachusetts is, of course, a striking example. Of a total voting age population in 1970 of 3,955,000, the number of voting age blacks was 115,000 —a percentage of 2.97. Yet Massachusetts has elected a black United States Senator. A 1974 study by the Joint Center for Political Studies produced a list, which is reprinted on the following page, of thirteen large American cities (over 50,000 people) with black populations of more than 20 percent which have elected black mayors.

us who would do no discredit to any station public or private, we will not support any man for office who is not selected by the public for himself, his character and his talents.

Schappes, *A Documentary History of the Jews in the United States*, 185-187 (1971).

City	Total Pop.	Total Black Pop.	% of Pop. Black	Total VAP	Black VAP	% of Black VAP
Berkeley, Calif.	116,716	27,421	23.5	95,804	19,397	20.2
Compton, Calif.	78,611	55,781	71.0	46,022	30,375	66.0
Richmond, Calif.	79,043	28,633	36.2	54,821	17,272	31.5
Atlanta, Ga.	496,973	255,051	51.3	354,642	167,796	47.3
E. St. Louis, Ill.	69,996	48,368	69.1	44,654	28,324	63.4
Gary, Ind.	175,415	92,695	52.8	115,209	57,212	49.7
Detroit, Mich.	1,511,482	660,428	43.7	1,072,953	423,032	39.4
Pontiac, Mich.	85,279	22,760	26.7	56,538	13,385	23.7
East Orange, N.J.	75,471	40,099	53.1	57,897	27,244	47.0
Newark, N.J.	382,417	207,458	54.2	253,236	123,093	48.6
Raleigh, N.C.	121,577	27,594	23.0	89,872	19,150	21.3
Cincinnati, Ohio	452,524	125,070	27.6	326,882	79,829	24.4
Dayton, Ohio	243,601	74,284	30.5	175,436	47,593	27.1

As Judge Frankel noted, Los Angeles—with a black population of only 18 percent—is an even more striking illustration (Pet. App. 44a). If there were validity to the premise on which the Department of Justice and the New York Legislature proceeded—*i.e.*, that if the total nonwhite population of an electoral district is less than 65 percent, the votes of nonwhites are necessarily submerged—all of these cities other than East St. Louis should always have elected whites.

C. Blacks Can Be Effectively Represented by Whites

The second invalid premise is that only nonwhite legislators are able to represent nonwhite voters. What reason could there be for the Department of Justice's view—communicated explicitly to the New York Legislature—that a nonwhite population percentage of 61.5 in a particular district is not "substantial" enough (App. 98-99, 105) to meet constitutional requirements? This assertion can only be based on a belief that a solid block of nonwhites is needed to achieve effective representation for the majority inhabitants of that district because otherwise a white legislator might be elected. But this assumes that a white legislator representing a district that is 61.5 percent nonwhite would disregard the interests of a majority of his constituency—a totally unrealistic assumption.

To be sure, there may be extreme situations where black and white residents in a particular community are so polarized that voting is done entirely along racial lines and, as a consequence, white representatives, if elected, can be expected to ignore the interests of the blacks who have voted against them. This extraordinary circumstance appears to have been true in *Wallace* v. *House*, 515 F.2d 619 (5th Cir. 1975),

which involved a Louisiana town of approximately 5000 people, slightly more than half of whom were black. The record showed a history of total racial segregation, and it was established that "with one recent and fortuitous exception, no black has ever been elected to municipal office . . ." 515 F.2d at 623. The court found that there had been "inexcusable neglect of black interests" by the white elected officials of the municipality (515 F.2d at 623-24).[16]

The unusual facts of *Wallace* are a far cry from the situation in Brooklyn. Can a white New York legislator, representing a district which is more than half nonwhite, in a county where seven of 22 assembly districts are majority nonwhite, refuse to render "effective representation" for his black constituents? No such allegation has been made and none could be. Indeed, the history of civil rights legislation in New York—which enacted laws prohibiting racial discrimination in employment, housing and public accommodations well before the federal Civil Rights Act[17]—demonstrates that the interests of nonwhites in the State were represented in the legislature well before there were substantial numbers of black or Chicano legislators.

[16] Similar facts—though not as extreme—appeared in the record of *White* v. *Regester*, 412 U.S. 755, 767, 769 (1973) where the organization in control of the local Democratic Party in Dallas County "did not . . . exhibit good-faith concern for the political and other needs and aspirations of the Negro community" and where the "Bexar County legislative delegation . . . was insufficiently responsive to Mexican-American interests."

[17] N.Y. *Civil Rights Law* §§ 40, 42, 43, (McKinney 1948), §§ 18-a to 18-e, 40-c, 40-d, 40-f, 41, 44 (McKinney Supp. July 1974).

D. Residential Patterns Determine a District's Racial Composition

A third false premise relates to the effect of residential patterns on the facile statistics relied upon by proponents of benign racial districting. The majority below noted, for example, that Kings County was 35.1 percent nonwhite and inferred, from this figure, that it was appropriate that three of the state senate districts—30 percent—contain "substantial nonwhite population majorities." It observed that this percentage was "slightly less minority concentration districts than the percentage of nonwhite voters in the county" and made the same observation regarding the parallel figures relating to the state assembly (Pet. App. 27a-28a, n. 21). This comparison fails to take account, however, of the fact that electoral districts are contiguous geographical units, and that residential patterns could not—other than by what Judge Frankel termed "wild accident" (Pet. App. 26a)—match the desired percentages of white and nonwhite voters. The Bedford-Stuyvesant area of the county is, for example, well known as a large nonwhite area. To the Department of Justice, its overwhelmingly black population constitutes "undue concentration" of a minority race. But by the very nature of a regional election-district system, as contrasted with state-wide proportional representation, districts will vary in minority-race population depending on residential patterns.

The fallacy of these comparative statistics—also relied upon by the NAACP (Br. in Opp. 5)[18]—is graphically illustrated by the Department of Justice's helplessness in dealing with the claim made to it in 1974

[18] "Br. in Opp." refers to the respondent-intervenor's Brief in Opposition to the Granting of a Writ of Certiorari filed in this case.

by Puerto Rican groups. It is conceded that 10.4 percent of the population of Kings County is Puerto Rican, and this should mean, by a parity of reasoning, that one-tenth of the county's assembly districts (*i.e.*, at least two) and one-tenth of its senate districts (*i.e.*, one) should have "viable" Puerto Rican majorities. But the Department of Justice was unable to hypothesize even a single contiguous district which could be "safely" Puerto Rican, and it admitted that the 1974 reapportionment submerged the Puerto Rican vote even more than did the 1972 districting (App. 295-296). This was all justified, however, on the ground that Puerto Rican residents of Kings County lived in an area "forming a corridor" which made it impossible to devise a Puerto Rican district (App. 296).

E. Perpetuation of Past Discrimination Is Not the Problem

The final erroneous assumption is that in voting there is a "residual effect" of "past discrimination" that warrants some affirmative race-conscious relief. We are able to conceive of no set of facts where the application of racially neutral criteria cannot provide a total remedy for any "past discrimination." As Judge Frankel observed, "If people have been forced in or out because of race, then, of course, the fences must be torn down and the districts in this manner redrawn lawfully. That is, the forbidden use of race must be overcome by some condign remedy" (Pet. App. 46a).

Racial discrimination in school assignment, housing availability and employment opportunity all have continuing effects beyond any period of active discrimination on account of race. The decisions of this Court relating to the remedial phase of school desegration concern the task of dismantling a dual school system and turning it into a unitary system. It has not proved to be enough, in the process of school desegregation, to say to students in formerly black and formerly white schools that they may now attend school together. *See, e.g., Green* v. *County School Board,* 391 U.S. 430 (1968). Nor has the assignment of black faculties to black schools and white faculties to white schools been remedied by declaring that there are no more black or white schools. *E.g., United States* v. *Montgomery County Bd. of Educ.,* 395 U.S. 225 (1969). In each of these instances, the effects of racial segregation have endured beyond the time when it was declared unlawful, and only affirmative remedial action—requiring race-conscious decisions—provides an effective remedy.

The same is true of employment and housing. White employees build up seniority during the time that they are discriminatorily hired and promoted in preference to blacks. Simply opening the door to blacks may result in perpetuation of a seniority scale that was improperly initiated. *E.g., Local 53, Asbestos Workers* v. *Volger,* 407 F.2d 1047 (5th Cir. 1969). Corrective or compensatory action might, in such cases, be deemed appropriate. And the same approach might be thought to justify benign race-consciousness in housing, if segregated residential patterns develop from years of active racial discrimination. People do not move from their homes overnight, and a judicial decree cannot, in and of itself, undo the effects of past conduct.

An election, on the other hand, is a single event occurring at regular intervals. If the election of 1972 was affected by improper racial districting, the remedy is to conduct an election in 1974 in which the districts are properly drawn according to neutral criteria. Tip-

ping the 1974 scales in favor of black voters does not compensate for an election improperly weighted towards whites two years before. In fact, if that is a proper corrective, what should happen in 1976? Should a racial gerrymander in favor of whites be designed to compensate for the 1974 tilt to blacks?

The NAACP—respondent-intervenor here—views this case as presenting the question of whether districting may be "designed to overcome the discriminatory effect of an earlier districting plan" (Br. in Opp. 2). But even if one were to accept all the exaggerated and inflammatory allegations made by the intervenors (and *not* accepted by the Department of Justice) and one were to assume, on this basis, that "a majority of blacks and Puerto Ricans in Kings County were gerrymandered into districts where a black or Puerto Rican candidate could not be elected" (Br. in Opp. 4),[19] what "residual effect" does this racial gerrymander have once it is declared unlawful and the county is reapportioned by neutral non-racial criteria? Is a benign racial gerrymander or a benign quota a useful or desirable means of correcting what has happened—or is it just an aggravation of the wrong?

F. Private Racial Prejudice Is Encouraged

The majority below compared the need to "offset previous race or color discrimination" in the voting area with remedies judicially recognized in the areas of education, housing, grand jury selection and employment (Pet. App. 26a-27a). In so doing, it overlooked one fundamental difference that overshadows

[19] Although one wonders, again, whether this confident assertion of foreordained results might not yield somewhat to the experience of Senator Brooke and Mayor Bradley.

whatever parallels may be thought to exist. In the electoral process, the ultimate decision must be a private one. Government officials draw geographic lines and, if constitutionally permitted, they may include or exclude individuals or groups in an effort to structure a district so as to secure the election of a black legislator or a Republican or a Catholic. But it is the electorate, and not the Legislative Committee on Reapportionment, that selects the individual who will represent the district. And it is surely contrary to the letter and spirit of the Constitution and to firmly entrenched public policy for government officials to encourage that electorate to choose its representative exclusively or primarily on the basis of color, creed or ethnic affiliation. Indeed, even the majority of the court of appeals recognized this important principle when it observed that "[t]hankfully, we seem more and more coming to the day when the American voters vote *person* or *party* or *issue* and not *color* or *race* or *sex*" (Pet. App. 27a, n.20; emphasis added).

In the fields of public education, housing, grand jury selection and employment, private choice is not as critical as in the electoral process, and the effect on that private choice of flagrant race-consciousness by official action is not as destructive. In the voting booth—more than anywhere else—it is essential, for the survival of our society, that racial differences be surmounted, not exaggerated or intensified. Precisely because it was imperative that the state not "induce racial prejudice at the polls," this Court unanimously struck down, more than ten years ago, a local statute that required candidates to be identified by racial designation on all ballots. *Anderson* v. *Martin*, 375 U.S. 399 (1964). That mechanism would have operated, the

Court observed, as a help to black candidates in districts where black voters predominate (375 U.S. at 402), but the injection, by official acts, of race as a factor in a voter's choice was deemed objectionable *per se*, no matter who benefits.

Even "benign" racial apportionment communicates to black and white residents of the gerrymandered district the message that race should be an overriding concern in their voting decision. Nonwhite voters in an election district that has deliberately been carved out so that they number 65 percent rather than 61.5 or 63.4 percent can only assume that their government wants and expects them to vote along racial lines. The official encouragement to racial prejudice at the polls is as telling here as when racial designations are attached to the names of the candidates. This is demonstrated by the testimony introduced during the hearing on petitioners' motion for a preliminary injunction. Abe Gerges, a district leader, testified as follows (App. 58):

> Q. How would you describe the factors that go into the decision of the Hasidic community, that is what factors determine whom they are to support?
>
> A. Well, the Hasidic community is a small, relatively small community and covers the 57th Assembly District. They are involved with people of all ethnic backgrounds, and particularly sit on committees, and here I am referring to Albert Friedman who sits on the board with people of all nationalities, black, white, Spanish et cetera.
>
> I think over the last several years the people of the 57th Assembly District have learned to work together, and I think this is really the injustice that we are talking about here today, it is

> that the people having worked together now are told that they can no longer work together because they are of a certain race.
>
> Q. Would this in your view lead to encouraging voting along racial lines?
>
> A. Absolutely, it is pitting, it is pitting one race against another race, which I do believe was not the intention of the law suit which was filed and successfully taken by the NAACP.
>
> Q. So is it that by the action that was taken in dividing up this community because of racial factors, therefore, members of that community are being encouraged to vote for members of their own race?
>
> A. Well, I think, I think that might not be what is on the top of the lever, that is what the talk is around that we hear, we are being at this point told that we must have someone of a certain race representing us as opposed to having a good man representing us.

Leopold Lefkowitz, a plaintiff in this action and a member of the Hasidic community, testified (App. 87):

> Q. Is it your view that the lines that are drawn will encourage voting on the basis of race, the lines that have been presently drawn?
>
> A. I think that this will bring out, especially after Mr. Schnapper's position here, this will bring out the racial issue, which we didn't, which we were fortunate in not having it in our community and I am very much afraid that this will become a racial issue now.
>
> Q. Because of the lines which have been drawn on this basis?

A. Yes, and because the lines were drawn on this basis on the recommendation from Mr. Schnapper.

II

REMEDIAL RACIAL DISTRICTING WAS UNJUSTIFIED BECAUSE THERE WAS NO FINDING OR EVIDENCE OF PAST DISCRIMINATION REQUIRING ANY REMEDY

The majority of the court of appeals sustained the racial gerrymander challenged in this case on the ground that it was needed "[t]o correct an invidious discrimination in favor of white voters and against nonwhites which had occurred in Kings County . . ." (Pet. App. 31a). But there was absolutely no finding by any executive, administrative, legislative or judicial body that there had been any such "invidious discrimination" and there was no probative evidence in the record—substantial or otherwise—to permit an inference that racial discrimination justifying a remedy had, in fact, occurred.

There is a recital in the NAACP's Brief in Opposition in this case of various assertions regarding districting in Kings County that were made by the NAACP to the Attorney General in its challenge to the 1972 reapportionment (Br. in Opp. 3-4). These assertions were contained in a lengthy letter sent to the Department of Justice (App. 204-221), and they were, quite clearly, not credited by the Department. The letter of April 1, 1974, from Assistant Attorney General Pottinger to New York officials, advising that the 1972 reapportionment was disapproved under Section 5 of the Voting Rights Act, did *not* find that there had been deliberate racial gerrymandering or even that nonwhite residents of the county or of particular legislative districts had been denied the opportunity "to enter into the political process in a reliable and meaningful manner." *White* v. *Regester,* 412 U.S., 755, 767 (1973). The Department of Justice's finding was based entirely on its own appraisal of the "concentration" and "diffusion" of nonwhites among the legislative districts in Brooklyn. We quote the relevant findings in full, and emphasize, by our own italicization, the tentative and uncertain characterizations which the intervenor-respondent and a majority of the court below have turned into findings of "invidious discrimination" (App. 15):

> Senate district 18 *appears* to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population *appears* to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. As with the congressional plan, *we know of no necessity for such configuration and believe other rational alternatives exist.*

The denial of the request for approval was couched in the following terms (App. 14-16; emphasis added):

> [O]n the basis of all the available demographic facts and comments received on these submissions *as well as the state's legal burden of proving that the submitted plans have neither the purpose nor the effect of abridging the right to vote because of race or color,* we have concluded that the proscribed effect *may* exist in parts of the plans in Kings and New York Counties.
>
> * * * * *
>
> On the basis of our findings, therefore, we *cannot conclude,* as we must under the Voting Rights

> Act, that those portions of these redistricting plans *will not have the effect* of abridging the right to vote on account of race or color.

The New York Legislature did not agree even with the guarded double-negative finding made by the Department of Justice—*i.e.*, that, given the State's burden of proof, it could not conclude that the reapportionment would not have a racial effect on the right to vote. The report of the Joint Legislative Committee on Reapportionment stated (App. 177):

> While the Joint Legislative Committee on Reapportionment does not subscribe to the ruling of the Justice Department as expressed in the April 1 letter of Assistant Attorney General J. Stanley Pottinger, the exigencies of time require that new legislation be enacted to satisfy immediately the objections of the Department of Justice and thereby permit an orderly primary and general election to take place in New York and Kings Counties in 1974.

That same report concluded with the following language (App. 188-189):

> The statutory authority granted to the Justice Department, exercised at a time immediately prior to the general election, effectively made it impossible for the State of New York to seek judicial review. In this instance, the State, while being afforded a right to judicial review is unable to secure a remedy due to the immediacy of the election. It is the opinion of the Committee that if judicial review was available within the time permitted, the existing apportionment would be held valid. . . .

Testimony introduced at the hearing on petitioners' request for a preliminary injunction corroborated that

(1) there was no affirmative finding by the Justice Department of actual racial discrimination and (2) the New York State authorities disagreed totally with the Justice Department conclusions but had no time to subject those conclusions to judicial review (App. 108-109):

> Q. Earlier today I showed you, I believe you said you hadn't seen them, but I showed you the complaint in this case and specifically Paragraph 13 where it is alleged that the conclusion of the Attorney General or Mr. Pottinger was based not on any finding of evidence or lack of evidence tending to establish that there was purposeful racial gerrymandering designed to reduce black representation in the State Legislature when the 1972 reapportionment and the 1966 reapportionment was drawn.
>
> From your understanding of conversations with attorneys in the Department of Justice, is that allegation true?
>
> A. Yes. They said the effect was to dilute the minority representation.
>
> Q. That is Paragraph 14?
>
> A. Yes.
>
> Q. Paragraph 15 says the Attorney General did not rest on any finding, evidence or lack of evidence, tending to show there was a history of past official discrimination against the black electorate of Kings County only corrected by deliberate maximum of black voting strength in elections held in '74. Is that also true?
>
> * * * * *
>
> A. At no time did any member of the Attorney General's staff indicate their decision was based on any past history of discrimination.

This record is a far cry from those on which this Court has found racial discrimination in apportionment, and there is every reason to believe that if the case had been fought by the New York authorities, they would have prevailed. In *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), for example, this Court reversed a conclusion that multi-member districting in Indiana was racially discriminatory and diluted the voting power of ghetto residents. Surely it was as *possible* in Marion County, Indiana, as in Kings County, New York, to devise an apportionment scheme that would have given more voting power to poor blacks. The record in *Whitcomb* v. *Chavis* established "no necessity" for multi-member districting and, as the Department of Justice found here, "other rational alternatives" existed. Yet this Court recognized that the burden of establishing racial malapportionment is on the party asserting that the apportionment is invalid. It said, in language fully applicable to the pre-1972 record in Kings County, "We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats." 403 U.S. at 149-150.

White v. *Regester*, 412 U.S. 755 (1973), on the other hand, involved a markedly different record. In that case, this Court relied on a district court's findings of (1) "official racial discrimination in Texas," (2)

very few blacks who had ever been in the county's legislative delegation, (3) lack of "good-faith concern for the political and other needs of the Negro community," (4) the use of "racial campaign tactics," and (5) the general efforts to exclude the black community from participation in the only meaningful primary (412 U.S. at 766-767). None of these highly probative factors can even be remotely alleged as to Kings County, New York, and their absence makes it impossible to conclude that there has been "invidious discrimination" in the past which requires corrective measures today.

Indeed, the only basis in the record or anywhere else for invoking the Voting Rights Act at all as to Kings County is the decision in *Torres* v. *Sachs*, 381 F.Supp. 309 (S.D.N.Y. 1974), that Puerto Rican natives are entitled to bilingual ballots. Ironically, the 1974 reapportionment challenged here did not increase the voting power of Puerto Rican residents of Kings County; it had the effect of spreading their communities among more legislative districts in each of which they exercised reduced proportional voting strength. Plainly, then, the 1974 apportionment did not correct any "invidious discrimination" against Puerto Ricans.

A comparison of the facts here with those in two cases now pending before the Court will show how totally devoid of proof of discrimination this record is. In *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *cert. granted*, 422 U.S. 1055 (1975), pending *sub nom.*, *East Carroll Parish School Board* v. *Marshall*, No. 73-861, a Louisiana county where there had been, until recently, substantial racial exclusion from voting rolls and where a dual school system had been maintained, changed from a ward election system to at-

large voting throughout the county. Nearly 60 percent of the county's residents were black, according to the 1970 census, but blacks were slightly less than half its voters. An *en banc* court of appeals, relying on a history of total racial segregation in the county until 1957 and a refusal to allow blacks to register to vote until 1962, reversed a district court judgment sustaining the at-large election. The court rejected evidence that, after entry of the district court's order, three blacks were elected in at-large elections and it found not dispositive the additional fact that there was no proof—as there had been in *White* v. *Regester* (see n. 16, *supra*)—that the white legislators had been "particularly insensitive to the interests of minority residents." 485 F.2d at 1306. Six judges dissented on the ground that *White* v. *Regester* had been misapplied, and this Court has now granted certiorari and heard argument.

If the simplistic arithmetical standards used here by the Justice Department were applied to the facts of *Zimmer*, the change to at-large voting would immediately be invalidated—whether or not there was a history of segregation and racial discrimination, whether or not black legislators had been elected, whether or not past legislatures had been hospitable to the needs of the black community. It would be enough simply to say that there is less opportunity to elect black legislators, that there is "no necessity" for an at-large plan, and that "other rational alternatives exist."

The same reasoning would, *ipso facto*, invalidate the New Orleans councilmanic redistricting involved in *Beer* v. *United States*, 374 F. Supp. 357 (D.D.C. 1974), *prob. jurisd. noted*, 419 U.S. 822 (1974), ***restored to***

the calendar for reargument, 421 U.S. 945 (1975), *pending as* No. 73-1869. That record, too, presented a lengthy history of official racial discrimination in "all facets of everyday life in New Orleans" (374 F. Supp. at 374, 395), indifference by elected city officials to the desires and needs of black citizens (*id.* at 375, 398), devices designed to exclude blacks from the registration rolls (*id.* at 374), and proof of polarized communities and racial bloc voting (*id.* at 375). If the standard used here by the Department of Justice and by the majority below in determining that there was "invidious discrimination" requiring "corrective action" were applied in *Beer*, all these factors would be irrelevant. It would suffice, to invalidate both New Orleans districting plans, that the court find—as it did—a mathematical reduction in black voting power from a statistical "natural potential." See 374 F.Supp. at 389. The *Beer* decision now *sub judice* here found (*ibid.*):

> deviations [which] are the consequence of fragmentation of the black vote for the five district seats and its compartmentation in districts so constructed that it attains a majority status in only one, in cooperation with the phenomena of at-large elections for the two remaining seats, and majority- and multiple-vote prerequisites to candidacy for any seat.

It may be that this Court will sustain the district court ruling in *Beer*. If it does, we believe essential elements in that decision will be the history of past practices in New Orleans which we have previously enumerated.[20] That history did not exist in Kings

[20] The United States' brief in *Beer* relied heavily on these factors, and the Solicitor General noted specifically that the district's court's findings were not based "merely on these statistics" but on residual

County and it totally distinguishes this case. The three-judge district court in *Beer* relied heavily on that history throughout its opinion and again in its conclusion. 374 F.Supp. at 400-401. If, on the other hand, *Beer* is not sustained, it follows, *a fortiori*, that there is no proof on this record of invidious racial discrimination justifying "corrective action" under the Voting Rights Act or any other statutory or constitutional authority.

We conclude this brief discussion of recent and pending cases involving the Voting Rights Act with one *caveat*. The respondents may seek to shield the 1974 New York districting by erecting around it the presumptions of validity that surround the usual legislative apportionment. They may argue—as the majority below sought to do (Pet. App. 27a-28a)—that unless the standards of *Whitcomb* v. *Chavis*, *White* v. *Regester* and *City of Richmond* v. *United States* are satisfied by the petitioners, the 1974 reapportionment withstands constitutional challenge. This argument ignores what really happened in this case and stands the remedy of the Voting Rights Act and the Fifteenth Amendment reapportionment decisions on its head.

If, in due course, the New York Legislature had held legislative hearings and made legislative determinations regarding the proper districting in Kings County, and if the outcome of that legislative process were challenged as racially discriminatory by white voters in Kings County, the standards of the reapportionment and Voting Rights Act cases would, of

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effects of pervasive racial discrimination. Brief for the United States, No. 73-1869, pp. 19-23.

course, apply. But this case involves no legislative judgment of any kind other than the decision that it was better to yield to the seemingly unlawful demands of the Department of Justice than for Kings County to have no 1974 election at all. Moreover, unlike the cases we have been discussing, this record is one in which there is overt racial motivation on the part of the legislature. Hence the first of the two disjunctive criteria announced in decisions under the Fifteenth Amendment applies here. See p. 25, *supra*.

Nor, for this reason, can the respondents take any comfort from the disallowance of the 1972 redistricting by the Department of Justice. Even granting that no private party may seek review of that decision under Section 5 of the Voting Rights Act—a proposition that leaves affected citizens totally remediless against the use of unconstitutional standards by federal officials if state officers find resistance to such illegality too expensive or time-consuming—the disallowance does not amount, in and of itself, to affirmative proof of "past invidious discrimination." Because of the peculiar shift of burden of proof resulting from 28 C.F.R. § 51.19, sustained in *Georgia* v. *United States*, 411 U.S. 526 (1973), over the vigorous dissent of three Justices, a local government's apportionment may be rejected on the basis of "evidence [that] is in equipoise" (411 U.S. at 545, White, J., dissenting). But such evenly balanced proof (or a total gap in the evidence, which would lead to a similar conclusion) is not equivalent to an affirmative finding of past discrimination that would alone justify remedial racial districting.

III

THE RACIAL QUOTA REMEDY IMPLIED IN THE ADVICE OF THE DEPARTMENT OF JUSTICE AND EXPLICITLY INVOKED BY THE NEW YORK LEGISLATURE BORE NO RATIONAL RELATION TO ANY ALLEGED PAST DISCRIMINATION

We come, finally, to the question discussed fully in Judge Frankel's dissent—whether any preexisting wrong inferable on this record could "justify, or render congruent, a presumptively odious concept of racial 'critical mass' as a principle for the fashioning of electoral districts" (Pet. App. 33a). Judge Frankel observed that no court had found that the 65 percent quota was "suited as a remedy for the unsurmounted objections of the Attorney General to the 1972 lines" (Pet. App. 40a), and he concluded, from his own canvass of possible bases for such a quota, that "there is no semblance of justification" for it (Pet. App. 50a). That conclusion—clearly supported by the record—is the most narrow ground for reversing the decision below and requiring the New York Legislature to reapportion these districts anew without consideration of this invidious racial criterion.

In *Milliken* v. *Bradley,* 418 U.S. 717 (1974), this Court reversed a remedy devised by a district court which had substantial evidence before it of racial segregation in public schools attributable to official policies and practices. The Court's view was that the remedy a federal court may utilize to correct past racial segregation may not substantially exceed, in scope, the constitutional violation that has been committed. The Court quoted from its opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971), and held that "federal remedial

power may be exercised 'only on the basis of a constitutional violation' and '[a]s with any equity case, the nature of the violation determines the scope of the remedy.' " 418 U.S. at 738.[21]

Whatever limitation there is to the "federal remedial power" that may be exercised by a court carrying out judicial functions under Article III of the Constitution, after a full adversary proceeding in which past segregation is established, must apply, *a fortiori,* to the "federal remedial power" of middle-echelon Executive Branch personnel (such as Assistant Attorneys General) who, without adversary proceedings or oral arguments, issue adverse conclusions based upon gaps in the *ex parte* presentations made to them. In other words, if a district judge could not have imposed a 65 percent racial districting quota on the New York Legislature if a record before him contained the same evidence of alleged racial discrimination as was presented here to the Department of Justice, it was no more permissible for that Department to suggest to the New York Legislature that this remedy be used in the discussions undertaken pursuant to the Voting Rights Act. In each instance, it is federal power that is being exercised over a subject of intrinsically local concern. If it would be an abuse of that power for a judge to exercise such authority, it is surely impermissible for the same kind of action to be taken by an executive officer—against whose arbitrariness there is far less legal safeguard.[22]

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[21] Later in its opinion (418 U.S. at 744), the Court again described as a "controlling principle" the rule "that the scope of the remedy is determined by the nature and extent of the constitutional violation."

[22] Because the New York authorities acted at the insistence of the Department of Justice, we joined the Attorney General as a de-

Nor can the intervenor-respondent take refuge behind the fact that this case formally challenges action taken by the New York Legislature. It is clear from the record that the legislature was applying no independent legislative judgment and that the 65 percent quota was not based on any legislative factfinding or other proceeding involving legislative evaluation or expertise. The New York Legislature was forced to do what it did by the demands of the Department of Justice based upon findings with which the legislature totally disagreed. Consequently, it cannot be said that the 65 percent quota is entitled to the respect of a legislative determination. It is, entirely, federal executive *fiat*—whether expressed outright or communicated by nods of approval when the magic figure was mentioned during negotiations.

Is there any rationality to the 65 percent figure? If one assumes that the objective is to maximize "nonwhite" voting power if "nonwhites" vote as a bloc, the 65 percent figure might be a means of achieving this goal. If a district has many more nonwhites than 65 percent, their votes would be wasted if substantially everyone voted along white-nonwhite racial lines. If it has a nonwhite population substantially less than 65 percent, the nonwhites may not be able to bring enough

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fendant in this action. We believe he is properly a party to the suit by analogy to decisions such as *Aguayo* v. *Richardson*, 473 F.2d 1090, 1102 (2d Cir. 1973); *River* v. *Richmond Metropolitan Authority*, 359 F.Supp. 611, 622 (E.D. Va. 1973); *aff'd*, 481 F.2d 1280 (4th Cir. 1973); *Hough* v. *Seaman*, 357 F.Supp. 1145 (W.D. N.C. 1973), *aff'd*, 493 F.2d 298 (4th Cir. 1974). In all these situations, federal officers caused local officials to deprive individuals of federal constitutional rights under color of State law, and the courts upheld joinder of the responsible federal officers as defendants.

people to the polls—given their lower registration percentages and the higher proportion of minors in the nonwhite population—to produce a majority. Hence the 65 percent figure might be an explainable statistic for maximizing nonwhite voting strength. We emphasize "might be," because there is no evidence in the record actually to support use of this particular figure. It rests on no proof tested by adversary process and on no legislative judgment.

Moreover, there are several flaws in the application of that percentage to this case. *First*, neither the Constitution nor any principle of federal law justifies nonwhite "maximization" as a legal objective. The only permissible goal is to remedy past discrimination. And if no discrimination had ever existed, nonwhite voting power would have been neither maximized nor minimized; it would simply have stood where neutral districting would have placed it. And neutral districting would not have fixed the nonwhite population of the 57th Assembly District at precisely 65 percent.

Second, the classification of all voters in "white" and "nonwhite" categories is particularly irrational and obnoxious. To young lawyers in Washington, D.C. who are unable to locate Prospect Park in Brooklyn or to find Williamsburgh on a map of Kings County (App. 177), racial distinctions in New York may seem describable as white *vel* nonwhite. Puerto Ricans and blacks living in New York City see it differently, as the separate Puerto Rican claims made to the Department of Justice indicate (App. 239-40, 295-97). See the discussion of this question in Judge Frankel's dissent (Pet. App. 39a, n. 4). And, as the petitioners' witnesses testified in the district court, the Hasidic community often viewed its interests as best represented

by members of other races or other religions. The short of the matter is that if, as the NAACP contends, blacks have been the victims of racial gerrymanders in Kings County in the past, corrective action (if that is appropriate in elections—see pp. 37-39, *supra*) should give blacks voting opportunities proportional to the 24.7 percent of the county-wide population that is black. There is no basis for remedying that discrimination by lumping blacks and Puerto Ricans together and limiting the percentage of those who are neither black nor Puerto Rican to 35 percent.

Third, the very inflexibility of the 65 percent figure refutes any claim that it was intended—as the NAACP has argued—as an innocuous measure of whether "the discrimination found by the Attorney General had been eliminated" (Br. in Opp. 7). If it were merely a helpful guideline, the New York legislative committee would not have rejected a 63.4 percent figure as inadequate (App. 115). Plainly it was viewed as a nonnegotiable minimum and must, accordingly, be judged by its validity in that guise.

Finally, for reasons similar to those discussed in an earlier portion of this brief and fully explicated by Judge Frankel in his dissenting opinion, a racial quota in districting is particularly irrational. Residential patterns—which would dictate the racial compositions of truly neutral districting—do not lend themselves to fixed racial-quota districting. And if one may legitimately district by quotas along racial lines, why not quota districting for religious and ethnic groups as well? Could a court, administrative agency or legislature conclude that certain ethnic groups had been underrepresented and are, therefore, entitled to augmented quotas today? There is, as Judge Frankel observed, no end to the "dizzying mass" of cognizable groups which deserve treatment equal to Brooklyn's "nonwhites."

CONCLUSION

This case involves an apportionment that was unconstitutional because it drew purposeful racial lines, was justified by no past history of discrimination, and implemented a wholly irrational and unsuitable districting standard. One election has already been conducted under this apportionment, to the injury of a group of citizens who suffer serious discrimination in many other aspects of daily life. For the reasons elaborated in this brief, we believe the 1974 apportionment must be declared invalid, and the district court instructed to implement, for the coming election, either lines improperly disapproved by the Department of Justice or some other districting that does not subject the plaintiffs to a racial quota.[23]

No matter from what vantage point it is viewed, this case involves a racial quota. The evils of such a legal standard were eloquently described by the late Professor Alexander Bickel and Professor Philip Kurland, who together authored an *amicus curiae* brief for this Court in *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), a case presenting much closer and more difficult issues—though related to those presented here:

> A racial quota creates a status on the basis of factors that have to be irrelevant to any objectives of a democratic society, the factors of skin color

[23] Mr. Scolaro testified that he had devised one plan that kept the Hasidic community together in the 57th Assembly District with a nonwhite population percentage of 63.4. This plan, he said, could be drawn up in 2-3 days (App. 125).

> or parental origin. A racial quota derogates the human dignity and individuality of all to whom it is applied. A racial quota is invidious in principle as well as in practice . . . The history of the racial quota is a history of subjugation not beneficence.
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> The evil of the racial quota lies not in its name but in its effect. A quota by any other name is still a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant, politically, economically, and socially.

The judgment of the court of appeals should be reversed.

Respectfully submitted,

NATHAN LEWIN
JAMIE S. GORELICK

MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W.—Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioners